



**NEVADA COMMISSION ON ETHICS  
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION  
REGARDING JUST AND SUFFICIENT CAUSE**

REQUEST FOR OPINION NO. 04-47

SUBJECT: KATHY AUGUSTINE  
NEVADA STATE CONTROLLER

**A. JURISDICTION:**

Controller Augustine is a public officer as defined by NRS 281.4365. As such, the Commission has jurisdiction over the complaint.

**B. REPORT OF INVESTIGATIVE ACTIVITIES:**

- Reviewed Request for Opinion #04-47 (see Tab B).
- Reviewed subject's response received August 13, 2004 (see Tab C).
- Reviewed investigative reports provided by Nevada Attorney General's office (see Tabs D, E, and F).
- Reviewed verbatim transcripts of interviews conducted by the Nevada Attorney General's office.
- Reviewed binders of forensic computer evidence prepared by the Nevada Attorney General's office.
- Conducted telephone conversations with Jennifer Normington, Jeannine Coward, Jim Wells, and Susan Kennedy.

**C. RECOMMENDATIONS:**

1. Based on investigative activities, the Executive Director recommends that the panel find that just and sufficient cause **DOES EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of:

- NRS 281.481(2);
- NRS 281.481(7); and
- NRS 281.481(9).

**SPECIFIC REASONS:**

Sufficient credible evidence exists to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether the subject of the complaint violated the above provisions of NRS Chapter 281.

2. Based on investigative activities, the Executive Director recommends that the panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to render an opinion in this matter relating to the provisions of:

- NRS 281.554.

**SPECIFIC REASON:**

The conduct described within the complaint occurred before the addition of NRS 281.554 to the Nevada Revised Statutes by Senate Bill 123 of the 2003 Nevada Legislature on October 1, 2003. Therefore, the provisions of NRS 281.554 cannot be retroactively applied to the conduct of Controller Augustine.

**D. SUMMARY OF REQUEST FOR OPINION**

The complaint alleges State Controller Kathy Augustine violated the provisions of NRS 281.481(7) in at least two instances by:

1. Using state employees Jennifer Normington, Jeannine Coward, Sheri Valdez, and Susan Kennedy to compile guest lists for campaign fundraisers, type campaign contribution lists, type Secretary of State campaign filings, draft campaign function invitations, write campaign speeches, log campaign contributions, work on campaign mailers, and attend political fundraisers on government time; and
2. Using state computers for word processing and data storage of documents relating to her campaign, using State Controller letterhead to send campaign correspondence to various parties, using state telephones and fax machines for transmitting messages and correspondence relating to her campaign, and using state printers and labels for printing address labels for campaign mailings.

The complaint further alleges Controller Augustine violated NRS 281.554(1)(b), by willfully causing the Office of the Controller to incur expenses in support of her candidacy for State Controller. Such expenses included salaries paid to employees while performing activities other than official state duties at Controller Augustine's direction and using office supplies such as letterhead, address labels, fax paper, and other material for creating and transmitting campaign correspondence.

**E. SUMMARY OF SUBJECT'S RESPONSE**

Controller Augustine admits she reasonably should have known the time expended by Jennifer Normington on her campaign at taxpayer expense was more than that allowed by law. Controller Augustine further argues the activities of Jeannine Coward, Sheri Valdez, and Susan Kennedy were de minimis in nature. Controller Augustine maintains that no person on her staff was coerced to perform campaign work; rather, the work was strictly voluntary. She further provides that these employees' perceptions of reprisal for failure to work on her campaign are unfounded. Finally, she argues the provisions of NRS 281.554 cannot be applied retroactively to the complaint. Controller Augustine's response in its entirety is under Tab C.

**F. PERTINENT STATUTES AND REGULATIONS**

**NRS 281.481 General requirements; exceptions.** A code of ethical standards is hereby established to govern the conduct of public officers and employees:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person. As used in this subsection:

(a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501.

(b) "Unwarranted" means without justification or adequate reason.

.....  
7. A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

- (4) The use does not create the appearance of impropriety;
- (b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or
- (c) The use of telephones or other means of communication if there is not a special charge for that use.

If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

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9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

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#### **NRS 281.554**

1. Except as otherwise provided in subsections 4 and 5, a public officer or employee shall not request or otherwise cause a governmental entity to incur an expense or make an expenditure to support or oppose:

- (a) A ballot question.
- (b) A candidate.

2. For the purposes of paragraph (b) of subsection 1, an expense incurred or an expenditure made by a governmental entity shall be considered an expense incurred or an expenditure made in support of a candidate if:

(a) The expense is incurred or the expenditure is made for the creation or dissemination of a pamphlet, brochure, publication, advertisement or television programming that prominently features the activities of a current public officer of the governmental entity who is a candidate for a state, local or federal elective office; and

(b) The pamphlet, brochure, publication, advertisement or television programming described in paragraph (a) is created or disseminated during the period specified in subsection 3.

3. The period during which the provisions of subsection 2 apply to a particular governmental entity begins when a current public officer of that governmental entity files a declaration of candidacy or acceptance of candidacy and ends on the date of the general election, general city election or special election for the office for which the current public officer of the governmental entity is a candidate.

4. The provisions of this section do not prohibit the creation or dissemination of, or the appearance of a candidate in or on, as applicable, a pamphlet, brochure, publication, advertisement or television programming that:

(a) Is made available to the public on a regular basis and merely describes the functions of:

- (1) The public office held by the public officer who is the candidate; or
- (2) The governmental entity by which the public officer who is the candidate is employed; or

(b) Is created or disseminated in the course of carrying out a duty of:

- (1) The public officer who is the candidate; or
- (2) The governmental entity by which the public officer who is the candidate is employed.

5. The provisions of this section do not prohibit an expense or an expenditure incurred to create or disseminate a television program that provides a forum for discussion or debate regarding a ballot question, if persons both in support of and in opposition to the ballot question participate in the television program.

6. As used in this section:

(a) "Governmental entity" means:

- (1) The government of this state;
- (2) An agency of the government of this state;
- (3) A political subdivision of this state; and
- (4) An agency of a political subdivision of this state.

(b) "Pamphlet, brochure, publication, advertisement or television programming" includes, without limitation, a publication, a public service announcement and any programming on a television station created to provide community access to cable television. The term does not include:

- (1) A press release issued to the media by a governmental entity; or
- (2) The official website of a governmental entity.

(c) "Political subdivision" means a county, city or any other local government as defined in NRS 354.474.

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**NAC 281.189 Scope of investigation by Executive Director.** The Executive Director may investigate relevant issues and facts beyond those presented in an ethics complaint in determining his written recommendation of whether just and sufficient cause exists for the Commission to render an opinion on the ethics complaint.  
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**NAC 284.770 Political activities.** Employees may vote as they choose and express their political opinions on all subjects without recourse, except that no employee may:

1. Directly or indirectly solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, monetary or nonmonetary contribution for a political purpose from anyone who is in the same department and who is a subordinate of the solicitor.

2. Engage in political activity during the hours of his state employment to improve the chances of a political party or a person seeking office, or at any time engage in political activity to secure a preference for a promotion, transfer or increase in pay.

## **G. RESULTS OF INVESTIGATION**

The Executive Director found significant relevant issues beyond those presented in the Request for Opinion, and analyzed the nexus of the issues in the context of the code of ethical conduct set forth in NRS 281.481. Pursuant to the provisions of NAC 281.189, the Executive Director presents these findings for consideration by NRS subsection.

The relevant issues may implicate violations of ethics law in addition to those alleged in the complaint. Counsel for Controller Augustine has been provided with notice of potential violations of NRS 281.481(2) and NRS 281.481(9), and intends to submit a response to these issues prior to the September 3 panel proceeding. The response of Controller Augustine will be faxed to you in its entirety prior to the panel proceeding.

***Allegations Regarding Violations of NRS 281.481:***

In her response to the complaint Controller Augustine admits that both state employees receiving state salaries as well as state resources (such as computer equipment) were utilized for her 2002 re-election campaign. Supporting documentation provided with the complaint thoroughly documents that state employees did in fact perform campaign work for Controller Augustine on state time at taxpayer expense using state-owned equipment. Investigative reports prepared by the Attorney General's office were compared against verbatim transcripts of witness interviews, and appear to be appropriate summations of the interviews. Telephone conversations with Jennifer Normington, Jeannine Coward, Jim Wells, and Susan Kennedy verified the accuracy of information provided by the Attorney General's office in Request for Opinion No. 04-47. And, three binders of forensic computer evidence obtained by the Attorney General's office and provided to the Commission document times and dates campaign-related materials were worked on by state employees on state computers during state work hours.

The question, then, is not whether the activities occurred. Rather, the question becomes what statutes might be implicated by the activities.

**NRS 281.481(7)**

The complaint alleges a violation of NRS 281.481(7), which prohibits a public officer from using governmental time, property, equipment or other facility to benefit his personal interest. The statute allows a limited personal use of same if four conjunctive criteria are met:

- (1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;
- (2) The use does not interfere with the performance of his public duties;
- (3) The cost or value related to the use is nominal; and
- (4) The use does not create the appearance of impropriety.

The Executive Director believes the four conjunctive criteria under which it is permissible to utilize government resources for personal use were not met. Controller Augustine had an established written policy against working on campaigns during state work hours. In the instance of at least one employee, Jennifer Normington, the activities on Controller Augustine's behalf significantly interfered with the performance of Ms. Normington's public duties. In terms of employee salaries, the resources expended were not nominal. The taxpayer cost of Ms. Normington's salary during calendar year 2002 alone, estimated at twenty-five percent of her

annual salary of \$39,695, was \$9,924. Finally, the use of government staff for a personal political campaign creates, at a minimum, the appearance of impropriety.

With many years in public service under her belt, Controller Augustine knew or should have known the act of using public employees to work on campaign activities violates the provisions of NRS 281.481(7).

However, the Executive Director believes the gravamen of this complaint is not the mere fact that public employees and resources were used to further Controller Augustine's re-election campaign.

The exegesis of the ethics in government law is found in NRS 281.421:

“NRS 281.421 Legislative declaration and findings.

1. It is hereby declared to be the public policy of this state that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.”

By using public resources to further her personal interests for re-election to public office, Controller Augustine's actions conflicted with her duty to hold public office for the sole benefit of the people of Nevada.

#### **NRS 281.481(2)**

NRS 281.481(2) prohibits a public officer from using his position in government to secure unwarranted advantages for himself, defining unwarranted as meaning without justification or adequate reason. By using state-paid employees to perform campaign work, Ms. Augustine gave herself an unwarranted advantage vis-à-vis her political campaign. Any state worker hours or equipment utilized by Controller Augustine in furtherance of her re-election activities saved political candidate Kathy Augustine campaign funds. In a statewide campaign in which candidate Kathy Augustine's campaign spent only \$112,499, the use of Controller's office employees to perform certain campaign functions on state time was certainly a cost-savings to the Augustine re-election campaign. Thus, Controller Augustine appears to have used her public office to obtain an advantage for herself that the three other candidates in the 2002 race for State Controller did not have – taxpayer-funded volunteers.

The Commission has previously addressed violations of NRS 281.481(2) in two tangential situations:

#### ***“NCOE Opinion No. 98-19:***

The issue in this matter is whether Ms. A used her position as a public attorney to grant an unwarranted privilege, preference or advantage for herself and a member of her household in violation of NRS 281.481(2)....

The Commission concludes that there is a violation of NRS 281.481(2)... *This benefit was unwarranted because it was easily avoidable. It does not matter how, where, or why*

*the situation presented itself. What does matter is that this situation could have been prevented... Public employees need to maintain a separation of their personal and private relationships that may in any way provide an unwarranted privilege or advantage that otherwise would not have presented itself had the person not been a public employee.”* (Emphasis added.)

Similarly, in *NCOE Opinion No. 04-05*, the Commission found Las Vegas Mayor Oscar Goodman had violated the provisions of NRS 281.481(2) by bestowing an unwarranted benefit on his son, Ross Goodman, by using his title and position as Mayor to promote a cocktail party for Ross Goodman’s company, iPolitix, at an U.S. Conference of Mayors meeting. The Commission ruled the opportunity for Ross Goodman to host the cocktail party would not otherwise have presented itself had Mayor Goodman not been a public officer. (The written opinion has not yet been published.)

The ability to use public employees and resources to promote her personal political campaign would not have existed had Kathy Augustine not held the position of Controller for the State of Nevada. Therefore, the provisions of NRS 281.481(2) appear to be implicated.

#### **NRS 281.481(9)**

The conduct of Controller Augustine may also implicate the provisions of NRS 281.481(9), which prohibit a public officer from attempting to benefit his personal interest through the influence of a subordinate. The evidence indicates Ms. Augustine created a work environment in which employees were faced with a Hobson’s choice. Several of the Controller’s office employees indicate they knew working on an election campaign during state working hours went against established office policy or even state law; however, they feared reprisal from Controller Augustine. Several of the employees involved were unclassified employees and believed their job would be in jeopardy should they decline requests to work on the campaign.

Controller Augustine’s directions to her staff regarding campaign work appear duplicitous at best. She verbally directed employees to perform campaign tasks after work hours; however, witness statements indicate she frequently requested state work be put aside or demanded campaign tasks be performed immediately during state work hours. That Controller Augustine expected campaign work to be the top priority was understood by staff in the mercurial work environment. After former Deputy Controller Jim Wells refused to work on Augustine’s re-election campaign, the working relationship between the two significantly changed such that he subsequently left his employment with the Controller’s office. In light of this, other employees seemed convinced that Controller Augustine was not to be confronted regarding campaign work on state time. The egregious nature of this conduct should be viewed through the perception of at least one employee who felt the necessity to choose between making her monthly mortgage payment or performing blatantly unethical tasks at the direction of an elected constitutional officer of this state who could hire or fire her ‘at whim.’

In her response, Controller Augustine contends she didn’t coerce employees to work on her re-election campaign; rather, that all campaign-related work was strictly voluntary. In support, she



cites an e-mail from Jim Wells which stated, in part, “If you ask me to prepare the report on my own time and I agree there is not a problem. When I or any other member of your staff volunteer our time to assist you either with your campaign or by attending an event on your behalf, we do it because we want to not because we have to.” (See copy of Wells’ e-mail under Tab G.) Augustine’s response further states, “Significant is that not a single employee told Controller Augustine that they did not want to do the work. Their impressions of reprisal are unfounded and are not part of this ethics complaint.”

While the Executive Director agrees that it is significant that not a single employee told Controller Augustine that they did not want to do the work, the Executive Director’s reasons for so doing differ from those of Controller Augustine. Witnesses indicate they were not asked to perform campaign work by Controller Augustine; rather, they were directed to perform campaign work. The e-mail sent by Jim Wells was preceded by Controller Augustine appearing in Mr. Wells’ office and directing him to fill out her campaign contribution and expenditure reports. The statement quoted by Controller Augustine was in fact finished by Wells stating, “It is all in how you ask.” Each witness contacted by the Executive Director expressed they were directed to perform campaign work, not given the option of so doing. And, each witness represented that it was clearly understood - not spoken, but understood – that it was expected the campaign work be done, often immediately and on state time.

Whether the actual impressions of reprisal held by various employees were unfounded is irrelevant. The fact that Controller Augustine acknowledges such perceptions is significant and should be part of the ethics complaint. The conduct of Controller Augustine appears to have instilled in several employees a legitimate belief that performing campaign work was a condition of employment. Conversely, the employees appear to have had a legitimate fear that failure to perform campaign work as directed by Controller Augustine, whether on or off the state clock, would result in the termination of their employment by Controller Augustine. Given these circumstances, the provisions of NRS 281.481(9) prohibiting the influence of a subordinate for the benefit of a public officer’s personal interest may be implicated.

Further, the July/August 2002 e-mail communication between Wells and Augustine specifically brings certain critical issues to Controller Augustine’s attention:

1. Controller Augustine had given Wells the impression her direction to prepare the campaign contribution and expenditure report was a condition of employment;
2. Requiring an employee to perform campaign work would violate NAC 284.770 (printed in its entirety in Section F of this report, and which is applicable to all state employees);
3. Requiring an employee to perform campaign work would violate Controller’s Office written policy;
4. Requiring an employee to complete the campaign report would qualify as work, and would violate the prohibition against engaging in political activity during employment hours; and
5. Employees must not fear repercussion.

Despite this communication from a key member of her management team, Controller Augustine continued to direct her paid staff to perform campaign activities both on and off the state clock throughout the remainder of the 2002 election season.

Accordingly, the Executive Director concludes credible evidence exists to substantiate potential violations of NRS 281.481(2), NRS 281.481(7), and NRS 281.481(9). Thus, it is the recommendation of the Executive Director that the panel find just and sufficient cause exists for the full Commission to hear the matter and render an opinion regarding whether Controller Augustine violated the provisions of NRS 281.481(2), NRS 281.481(7), and NRS 281.481(9).

#### ***Allegations Regarding Violations of NRS 281.554:***

Senate Bill 123 of the 2003 Nevada Legislature added the provisions of NRS 281.554 to the Nevada Revised Statutes effective October 1, 2003. Such provisions cannot be retroactively applied to conduct alleged to have occurred in calendar years 2001 and 2002.

Therefore, the Executive Director recommends the panel find just and sufficient cause does not exist for the Commission to hear the matter and render an opinion regarding whether Controller Augustine violated the provisions of NRS 281.554.

#### **H. CONCLUSION**

The Executive Director hereby recommends that the panel find sufficient credible evidence exists to support a finding of just and sufficient cause for the Commission to hear the matter and render an opinion on whether the subject of the complaint violated:

- NRS 281.481(2);
- NRS 281.481(7); and
- NRS 281.481(9).

Further, the Executive Director hereby recommends that the panel find no just and sufficient cause exists for the Commission to hold a hearing and render an opinion on the allegation that the subject violated NRS 281.554, and further that the allegation be dismissed.

DATED: August 26, 2004

Stacy M. Jennings

STACY M. JENNINGS, MPA  
EXECUTIVE DIRECTOR